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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91212694
Party	Defendant Xiamen Hwaart Composite Material Co.,Ltd
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BOND MANUFACTURING CO., *Opposer*, v. XIAMEN HWAART COMPOSITE MATERIAL CO. LTD., *Applicant*.	Opposition No. 91212694 Serial No. 85/834,200

APPLICANT'S MOTION TO DISMISS OPPOSITION

The Applicant, Xiamen Hwaart Composite Material Co. Ltd. ("Applicant" or "Hwaart"), hereby moves, pursuant to Fed. R. Civ. P. 12(B)(6) and Trademark Trial and Appeal Board Manual of Procedure ("T.B.M.P.") §§ 307.02(a) and 503.03, to dismiss the Notice of Opposition for failure to state a claim upon which relief can be granted, and because the Opposer lacks standing.

The undersigned counsel for the Applicant was first contacted regarding this matter on November 3, 2013. After learning on November 4, 2013, that the deadline to answer was due the following day, *i.e.*, November 5, 2013, Applicant's counsel asked Opposer's counsel to consent to a thirty (30) day extension of the deadline. Opposer's counsel refused to agree.

I. RELEVANT FACTS

The Applicant designs, manufactures, and sells, among other items, indoor electric fire places and outdoor propane heating products such as propane fire tables, fire bowls and fire columns, and has facilities in Xiamen, Fujian, China. On January 28, 2013, Applicant filed its application to register its HWAART trademark in international class 011.

The Opposer claims to be a "... supplier of outdoor products, including decorative fire bowls and fire tables, gas fired patio heaters, and gas fired barbeques" (the "Disputed Designs"), and the owner of the BOND, BOND and design, and ENVIROSTONE marks (the "Opposer's Marks"). *See* ¶ 4 of the Notice of Opposition.

The Opposer also claims to be the owner of the designs of certain products created by the Applicant pursuant to an agreement that expired in July of 2012. *Id.* at ¶¶ 5 and 6.

On May 8, 2013, the Opposer filed an action that is currently pending in the United States District Court for the District of Nevada, captioned *Bond Manufacturing Co. v. Xiamen Hwaart Composite Material Co., Ltd., et al.*, Case No. 2:13-cv-00812-APG-NJK (the "Federal Action"), in which it alleged that the Applicant infringed the Opposer's Marks, and misappropriated the Disputed Designs. *Id.* at ¶ 10. The Applicant's HWAART trademark is not at issue in the Federal Action.

On July 30, 2013, the application for the Applicant's HWAART trademark was published for opposition. On September 26, 2013, the Opposer filed its Notice of Opposition. The basis for the opposition is that "... the registration sought by Applicant is contrary to the provisions of Section 2(d) of the Lanham Act." *Id.* at ¶ 19.

The Opposer alleges two bases for its claim that it would be damaged by the registration of the Applicant's HWAART trademark. The first is that a likelihood of confusion would purportedly arise because the "...Applicant has repeatedly affixed its mark to Bond's products and otherwise conducted itself in violation of the Lanham Act." *Id.* at ¶ 18. Critically, the Opposer has not alleged that the Applicant's HWAART trademark is confusingly similar to any of the Opposer's Marks. Absent that allegation, the facts alleged do not support a claim under § 2(d), and are insufficient to support standing to file this Opposition.

The second reason that the Opposer argues that a likelihood of confusion would arise and that it would be damaged is because, "... at the time Applicant filed the Application, Applicant did not have actual use of Applicant's Mark as a trademark on each of Applicant's purported Goods." *Id.* at ¶ 20-22. Even if true, this allegation is insufficient to warrant denial of registration without the additional allegation that registration of the HWAART trademark is likely to cause confusion with the Opposer's Marks. Therefore, Opposer's claim under Section 2(d) is insufficient to support standing.

II. OPPOSER HAS NO STANDING BECAUSE THE APPLICANT'S USE OF THE "HWAART" MARK DOES NOT CREATE A LIKELIHOOD OF CONFUSION WITH ANY OF OPPOSER'S TRADEMARKS

The Opposer has not pled any discernible grounds for a claim under § 2(d) of the Trademark Act. It therefore, has no "real interest" in the proceeding, or "reasonable basis" for believing that it will suffer damage if the HWAART trademark is registered. Opposer, therefore, does not have the requisite standing to bring the present opposition.

Section 13 of the Trademark Act provides, in relevant part, that "[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register, may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefore ". To have standing to file an opposition, a party must satisfy two judicially-created requirements. First, it must have a "real interest" in the proceeding. To satisfy this requirement, the opposer must plead "... a direct and personal stake in the outcome of the opposition." *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999).

Secondly, the opposer must have a "reasonable" basis for its belief of that it will be damaged. To satisfy this prong, the opposer must have more than a subjective belief it will be

damaged. *Id.* at 1025-28.

The only basis that the Opposer has alleged to establish either a real interest or its claim that it will be damaged if the HWAART mark is registered is that the mark is likely to cause confusion in violation of § 2(d) of the Trademark Act. As the Board has said "[i]n a likelihood of confusion case under Trademark Act § 2(d) ... an opposer [must] prove that **it has some prior trademark right and that applicant's mark is likely to cause confusion with that trademark.**" *Sheraton Corp. of America v. Sheffield Watch of New York, Inc.*, 167 U.S.P.Q. 248 (T.T.A.B. 1970), *rev'd*, 480 F.2d 1400, 178 U.S.P.Q. 468 (C.C.P.A. 1973)(emphasis added); *Midland International Corp. v. Midland Cooperatives, Inc.*, 434 F.2d 1399, 168 U.S.P.Q. 107 (C.C.P.A. 1970); *Midland Cooperatives, Inc. v. Midland International Corp.*, 421 F.2d 754, 164 U.S.P.Q. 579 (C.C.P.A. 1970) (collateral estoppel in opposition based on § 2(d) from decision in infringement suit).

Stated differently, to establish standing to oppose registration of a mark on basis of likelihood of confusion under § 2(d), the opposer must allege that the applicant's mark so resembles its registered or common-law mark as to be likely to cause confusion when used on related goods or services. *Fossil Inc. v. Fossil Group*, 49 U.S.P.Q.2d 1451, 1998 WL 962201 (T.T.A.B. 1998).

Because the Opposer has not alleged that it has prior rights in a mark that is confusingly similar to the Applicant's HWAART trademark, it has neither a real interest in this proceeding, nor a reasonable basis for a belief that it will be damaged due to registration of the HWAART mark. The Opposer, therefore, has no standing to bring this proceeding.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board dismiss this Opposition for failure to state claim upon which relief can be granted and because it lacks standing.

Date: November 5, 2013
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by first class mail this 5th day of November, 2013, upon the following:

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